

**EX PARTE OR LATE FILED**

**REDACTED - FOR PUBLIC INSPECTION**

January 28, 2010

**VIA COURIER**

**FILED/ACCEPTED**

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**JAN 28 2010**

Federal Communications Commission  
Office of the Secretary

**ORIGINAL**

**Re: *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, WC Dkt. No. 09-95***

Dear Ms. Dortch:

On behalf of One Communications Corp., tw telecom inc., Cbeyond, Inc., and Kentucky Data Link, Inc., please find enclosed two copies of the redacted version of an *ex parte* letter and attachments ("the Joint Commenters' *Ex Parte* Filing") for filing in the above-referenced docket. Although only page 3 of the *ex parte* letter contains redacted information, each page of the redacted version of the Joint Commenters' *Ex Parte* Filing has been labeled "REDACTED - FOR PUBLIC INSPECTION" for consistency. Pursuant to the Public Notice in this proceeding,<sup>1</sup> one copy of the redacted version of the Joint Commenters' *Ex Parte* Filing will be provided electronically to Alex Johns, Jeff Tobias, David Krech, and Jim Bird, and to Best Copy and Printing, Inc. One copy of the redacted version will also be filed electronically via ECFS.

Pursuant to paragraph 14.b. of the *Protective Order* in this proceeding,<sup>2</sup> one original of the confidential version of the Joint Commenters' *Ex Parte* Filing is being filed with the Secretary's Office under separate cover. Pursuant to paragraph 14.e. of the *Protective Order*, two copies of the confidential version of the Joint Commenters' *Ex Parte* Filing will be filed with Gary Remondino of the Competition Policy Division of the Wireline Competition Bureau, and one copy of the confidential version of the Joint Commenters' *Ex Parte* Filing will be

<sup>1</sup> *In re Applications filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment and Transfer of Control*, Public Notice, WC Dkt. No. 09-95, DA 09-1793 (rel. Aug. 11, 2009) ("Public Notice").

<sup>2</sup> *In re Applications filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment and Transfer of Control*, Protective Order, WC Dkt. No. 09-95, DA 09-2573 ¶ 14.e (rel. Dec. 18, 2009) ("Protective Order").

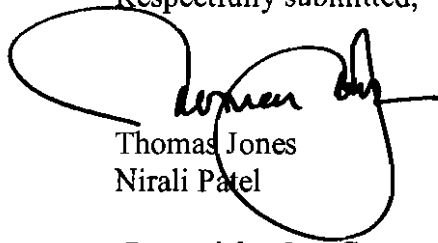
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served on Frontier and Verizon, the Submitting Parties. Although only page 3 of the *ex parte* letter contains confidential information, each page of the confidential version of the Joint Commenters' *Ex Parte* Filing has been labeled "CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 09-95 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION" in order to minimize the risk of inadvertent disclosure.

Please do not hesitate to contact me if you have questions regarding this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over a large, loopy, circular scribble that also partially covers the printed name below it.

Thomas Jones  
Nirali Patel

*Counsel for One Communications Corp.,  
tw telecom inc., Cbeyond, Inc., and  
Kentucky Data Link, Inc.*

Enclosures

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**Re: *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, WC Dkt. No. 09-95***

Dear Ms. Dortch:

One Communications Corp. ("One Communications"), tw telecom inc. ("tw telecom"), Cbeyond, Inc. ("Cbeyond") and Kentucky Data Link, Inc. ("Kentucky Data Link") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this letter in response to the Applicants' recent *ex parte* filings<sup>1</sup> and Reply Comments<sup>2</sup> in the above-referenced proceeding. As

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<sup>1</sup> Letter from John T. Nakahata, Counsel for Frontier Communications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Jan. 22, 2010) ("Frontier's January 22nd *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Jan. 20, 2010) ("Applicants' January 20th *Ex Parte* Letter"); Letter Requesting Second Protective Order from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 23, 2009) ("Applicants' December 23rd *Ex Parte* Letter Requesting Second Protective Order"); Letter Providing Confidential Information from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 23, 2009) ("Applicants' December 23rd Confidential *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 22, 2009) ("Applicants' December 22nd *Ex Parte* Letter"); Letter from John T. Nakahata et al., Counsel for Frontier Communications Corporation, and Michael E. Glover et al., Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Dec. 17, 2009) ("Applicants' December 17th *Ex Parte* Letter"); Letter from John T.

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discussed herein, the proposed transaction between Verizon and Frontier poses material risks to wholesale customers and to competition generally. Accordingly, the Commission cannot conclude that the proposed transaction will serve the public interest unless it conditions its approval on requirements that increase the likelihood that the proposed transaction will yield net public interest benefits.<sup>3</sup> The Joint Commenters have proposed conditions, attached hereto as “Attachment A,” that should achieve this result. Further, as discussed in Section V *infra*, the existence of settlement agreements between the Applicants and interested parties at the state level, while helpful, does not obviate the need for the FCC to impose the proposed conditions.

### **I. The Merged Firm Will Lack The Incentive To Provide Wholesale Inputs In Compliance With Its Statutory Obligations.**

The Joint Commenters previously explained that there is a significant risk that the Merged Firm will lack the experience, resources or incentive to provide wholesale inputs in compliance with its statutory obligations.<sup>4</sup> The Applicants’ Reply Comments and subsequent *ex parte* filings only confirm this conclusion. To begin with, the financial posture of the Merged Firm will be materially less strong than the Applicants would have the Commission believe. In analyzing its financial position post-transaction, Frontier relies in part on the transferred ILEC assets’ access lines and revenues as of December 31, 2008.<sup>5</sup> But this is misleading because, although the Applicants state that they will be acquiring approximately 4.79 million revenue-producing access lines,<sup>6</sup> the ILEC assets to be transferred in this transaction have been experiencing dramatic declines in access lines and revenues.

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Nakahata, Counsel for Frontier Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 09-95 (filed Nov. 23, 2009) (“Frontier’s November 23rd *Ex Parte* Letter”).

<sup>2</sup> Opposition to Petitions to Deny and Reply to Comments by Frontier Communications Corporation and Verizon Communications Inc., WC Dkt. No. 09-95 (filed Oct. 13, 2009) (“Applicants’ Reply Comments”); *id.*, Exhibit 1, Declaration of Daniel J. McCarthy (“McCarthy Decl.”) & Exhibit 2, Declaration of Stephen E. Smith (“Smith Decl.”).

<sup>3</sup> See, e.g., *In re Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd. 8741, ¶ 9 (2009) (“*CenturyTel-Embarq Merger Order*”) (explaining that under the Commission’s public interest standard of review, the Commission “employs a balancing test weighing any potential public interest harms of the proposed transaction against the proposed public interest benefits”).

<sup>4</sup> See Petition to Deny of tw telecom inc., One Communications Corp., Integra Telecom, Inc., and Cbeyond, Inc., WC Dkt. No. 09-95, at 17-24 (filed Sept. 21, 2009) (“Joint Commenters’ Petition to Deny”).

<sup>5</sup> See Frontier’s November 23rd *Ex Parte* Letter, Attachment, Frontier Investor Presentation (Nov. 2009) at 21 (“Frontier November 2009 Investor Presentation”) (showing Spinco access line detail as of Dec. 31, 2008); *id.* at 16 (calculating Frontier *pro forma* revenues based on Spinco 2008 revenues).

<sup>6</sup> See, e.g., *id.* at 21.

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By the Applicants' own estimation, the "Verizon Separate Telephone Organization," or "Spinco," lost approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its access lines during 2009.<sup>7</sup> It is therefore appropriate to discount the Applicants' estimate of the revenue to be generated by Spinco post-transaction by approximately the same amount. Thus, the Merged Firm will not be as financially strong as the Applicants claim. This is especially so given that the price that Frontier will pay for Spinco does not appear to diminish with the loss of access lines and revenues.

As Frontier itself recognizes, Frontier must stop this trend of access line and revenue loss in order for the proposed transaction to make business sense. Otherwise, the Merged Firm will end up very much like the other firms to which Verizon has previously spun-off unwanted assets—in bankruptcy.<sup>8</sup> According to Frontier, the key to improving the competitiveness and profitability of the transferred ILEC assets as compared to their performance as part of Verizon is to deploy broadband to more customers.<sup>9</sup> Frontier states that, with a strategy focused on broadband deployment, it "expects that in time the product and service penetration rates in the acquired areas will be much closer to the levels achieved in its current service areas, stemming line loss, improving revenues, and resulting in more services for customers."<sup>10</sup> Indeed, Frontier claims to specialize in getting the most out of exactly the types of ILEC assets that are the subject of the proposed transaction—those outside of big urban and suburban markets.<sup>11</sup>

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<sup>7</sup> Applicants' December 23rd Confidential *Ex Parte* Letter, Exhibit 2. This continues a trend in which Spinco lost [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its access lines, respectively, during 2007 and 2008. *Id.*

<sup>8</sup> Hawaiian Telcom filed for bankruptcy on December 1, 2008. *See* Hawaiian Telcom Communications, Inc., Form 8-K (filed Dec. 1, 2008), <http://www.hawaiiantel.com/LinkClick.aspx?fileticket=8LOqv91%2BAd8%3D&tabid=370>. FairPoint filed for bankruptcy on October 26, 2009. *See* Press Release, FairPoint Communications, Inc., "FairPoint Reaches Agreement with Bank Lenders – Initiates Voluntary Chapter 11 Proceeding," (rel. Oct. 26, 2009), [http://phx.corporate-ir.net/phoenix.zhtml?c=122010&p=irol-newsArticle\\_pf&ID=1345992&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=122010&p=irol-newsArticle_pf&ID=1345992&highlight=).

<sup>9</sup> *See* McCarthy Decl. ¶¶ 10-15, 19-21 (explaining how Frontier's broadband deployment strategy will improve the performance of the transferred ILEC assets).

<sup>10</sup> *Id.* ¶ 19; *see also* Applicants' December 23rd *Ex Parte* Letter Requesting Second Protective Order at 3 ("Frontier has not hidden that it sees broadband deployment . . . as the key to reducing churn.").

<sup>11</sup> *See* McCarthy Decl. ¶ 13 ("[W]hat may be deemed as a small or secondary market (attracting relatively low investment priority) to a nationally diversified provider can be an important growth market for a more specialized provider which is focused on smaller market operations and is more willing to dedicate capital and operating attention. That is the case here. Providing broadband and related services to underserved or unserved customers in the new Frontier areas represents a significant business growth opportunity for Frontier and is a key driver of this transaction.").

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This is, undeniably, a tall order for Frontier with the ILEC assets at issue here. There is a significant risk that Frontier will fail and that, notwithstanding its efforts, line losses will continue at or close to their current high rate in the Verizon territory subject to this transaction. As Frontier's Executive Vice President and COO, Daniel McCarthy, explains, it is "critical" that Frontier have "strategic clarity" as to how it can "deploy its resources most productively."<sup>12</sup> That means, focusing on, among other things, "customer retention," "win-backs of former customers," "operating expense reductions," and "efficient use of capital resources."<sup>13</sup>

The need to squeeze as much profit as possible out of the transferred assets by advancing these goals is entirely incompatible with the need to upgrade Frontier's OSS and meet Frontier's other wholesale obligations to competitors. It cannot be that helping Frontier's competitors is consistent with Frontier's stated objectives of retaining customers, winning back customers lost to competitors, reducing operating expenses, and utilizing capital resources efficiently. Notably, while Frontier describes its success in advancing these objectives in other territories, it does not offer any analysis of the extent to which those areas are served by CLECs to whom Frontier is obligated to provide wholesale inputs. This is unsurprising. The very logic of this transaction is antithetical to Frontier's satisfaction of its statutory obligations to provide wholesale inputs to CLECs. Rather, Frontier's incentive post-transaction will be to focus on increasing its retail revenues and starving its wholesale operations of investment. Accordingly, the Commission cannot find that the proposed transaction is in the public interest unless it imposes conditions to ensure that the Merged Firm complies with its wholesale obligations.

### **II. Although The Applicants Will Not Be Developing Entirely New OSS, The OSS Transitions Planned For The Proposed Transaction Pose Many Of The Same Risks As Previous Verizon Spin-off Transactions.**

In their Petition to Deny (at 19-22), the Joint Commenters explained that the serious OSS integration problems that arose after previous Verizon spin-off transactions require that the Commission closely examine the basis for the Applicants' claims that the Merged Firm's OSS will function sufficiently post-transaction. The FCC cannot simply take the Applicants at their word that "neither retail nor wholesale customers will experience disruptions in service, ordering, or billing."<sup>14</sup>

The problems experienced in Maine, Vermont and New Hampshire after Verizon spun off its ILEC assets in those states to FairPoint imposed extraordinary costs on competition and consumer welfare. This is not a harm that can simply be dismissed with a wave of the hand as the Applicants suggest. As detailed in the attached Declaration of Paul Olenik, Director of Service Implementation

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<sup>12</sup> *Id.* ¶ 11.

<sup>13</sup> *Id.* ¶ 14.

<sup>14</sup> Consolidated Application for Transfer of Control and Assignment of International and Domestic Section 214 Authority, Exhibit 1, Description of the Transaction and Public Interest Statement, WC Dkt. No. 09-95, at 20 (filed May 29, 2009) ("Application").

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for One Communications, as a direct result of Verizon and FairPoint's flawed OSS transition, One Communications experienced myriad problems that have impeded its ability to serve its customers and compete effectively in New England.<sup>15</sup> Among other things, following the cutover, FairPoint was unable to process wholesale orders in a timely manner, resulting in a backlog of numerous orders, including hundreds of One Communications' orders.<sup>16</sup> In addition, FairPoint's databases for Customer Service Records, Address Validation information, and Loop Qualification data contained incomplete and inaccurate information for pre-ordering for as long as six months following the cutover.<sup>17</sup> In fact, FairPoint was forced to conduct multiple updates of approximately 500,000 to 600,000 records in the months following the cutover.<sup>18</sup> The lack of complete and accurate data following the cutover hindered One Communications' ability to submit orders and ultimately resulted in delayed provision of service to One Communications' customers.<sup>19</sup> One Communications also experienced numerous other problems with FairPoint's wholesale OSS related to provisioning, billing, and repair.<sup>20</sup>

It took FairPoint approximately six to eight months to resolve most of these problems.<sup>21</sup> In the process, many One Communications customers cancelled their service orders, resulting in hundreds of thousands of dollars in lost revenues for the company.<sup>22</sup> At the same time, One Communications was forced to devote staff and resources to conducting daily conference calls, performing manual research, and repeating tasks, such as resubmitting orders to FairPoint.<sup>23</sup> One Communications estimates that this lost productivity has cost the company hundreds of thousands of dollars.<sup>24</sup>

The Applicants claim that similar problems will not occur following the proposed transaction because, unlike FairPoint (and Hawaiian Telcom before it), Frontier will not be building new OSS

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<sup>15</sup> See Declaration of Paul Olenik on Behalf of One Communications Corp., ¶¶ 4-13 (dated Jan. 20, 2010) ("Olenik Decl.") (attached hereto as "Attachment B").

<sup>16</sup> See Olenik Decl. ¶ 5; *see also id.* ¶ 6.

<sup>17</sup> See *id.* ¶ 7.

<sup>18</sup> See *id.* ¶ 8.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* ¶¶ 9-11.

<sup>21</sup> See *id.* ¶ 12.

<sup>22</sup> See *id.* ¶ 13.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

from scratch.<sup>25</sup> According to Frontier, the proposed transaction “involves significantly less operational risk than did the FairPoint transaction” because “Frontier will avoid the significant expense and huge risk associated with developing new systems, as it is using Verizon’s existing systems in thirteen states, and its own existing systems in the fourteenth.”<sup>26</sup> But the OSS transitions planned for the proposed transaction are not nearly as simple as the Applicants would have the Commission believe. As explained below, even though the Applicants will not be developing entirely new systems, the OSS transitions planned for the proposed transaction pose many of the same risks as the previous Verizon-FairPoint transaction.<sup>27</sup>

#### A. OSS Transition In The 13 Affected States

As a threshold matter, Frontier will *not* be using Verizon’s existing systems in 13 of the 14 affected states (excluding West Virginia) (“13 Affected States”). Rather, Frontier will be relying on a *copy* of Verizon’s existing systems. To be sure, there is a difference between creating new systems without the benefit of a prior model to work from (as was the case in the previous Verizon spin-offs to Hawaiian Telcom and FairPoint) and creating a replica of existing systems. Nevertheless, a tremendous amount of work is required to replicate the legacy GTE systems that Verizon currently uses to provide service in the 13 Affected States, migrate the Verizon data to the replicated systems, separate the replicated systems from Verizon’s legacy OSS, and transfer the replicated systems to Frontier.<sup>28</sup> As Mr. Olenik explains, “[t]he process of replicating Verizon’s systems for the 13 Affected States is a substantial undertaking and could result in major systems failures.”<sup>29</sup> In particular, there is “significant room for error in each step of the replication process described by Verizon . . . , including creating ‘a functioning separate instance [] of the existing GTE systems used today,’ ‘load[ing] [it] with all customer-related data,’ and transferring ‘the replicated systems, including the Fort Wayne data center and the hardware it contains,’ to Frontier.”<sup>30</sup> The replication process described by the Applicants raises a number of concerns and unanswered questions.

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<sup>25</sup> See, e.g., Applicants’ December 22nd *Ex Parte* Letter at 3; Applicants’ Reply Comments at 34 & 40; Smith Decl. ¶¶ 17-21.

<sup>26</sup> McCarthy Decl. ¶ 65.

<sup>27</sup> See Olenik Decl. ¶¶ 14-21.

<sup>28</sup> For example, according to the Applicants, separating the replicated systems and transferring them to Frontier involves both “relocat[ing] Fort Wayne based systems to other [Verizon] data centers in order to serve those areas utilizing these systems that remain with Verizon, including its Texas, Florida, and most of California operations,” and “complet[ing] the movement of servers, systems and applications supporting the transaction-specific service areas into the Fort Wayne center.” Applicants’ December 22nd *Ex Parte* Letter at 2.

<sup>29</sup> Olenik Decl. ¶ 15.

<sup>30</sup> *Id.* (quoting Smith Decl. ¶¶ 7-13).



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*First*, it is not clear what *exactly* is being replicated. That is, to the extent that the ILEC assets to be transferred in the proposed transaction belong to different legacy GTE operating regions, it is not clear how many “GTE-predecessor systems”<sup>31</sup> will be replicated and whether there are any significant differences between these GTE-predecessor systems that could add to the complexity of the replication of these systems.<sup>32</sup>

*Second*, Verizon has not provided sufficient information about the testing and validation that it will conduct during the replication process, particularly with respect to the data migration that will occur. As Mr. Olenik states, “it is not clear how Verizon will ensure that its data will be copied accurately and in its entirety.”<sup>33</sup> For example, “it is not clear whether Verizon has established benchmarks for determining that the data migration was successful.”<sup>34</sup> As One Communications’ experience with post-transaction FairPoint demonstrates, failure to migrate Verizon’s data accurately and completely could result in significant degradation of Frontier’s pre-ordering, ordering, provisioning, billing, and repair functions.<sup>35</sup>

*Third*, Verizon states that it “plans to operate the replicated systems in full production mode” (i.e., as its customer-facing systems) “for at least 60 days prior to closing, ensuring system performance with Frontier validating the results.”<sup>36</sup> Thus, there is a possibility that Verizon will use the replicated systems to serve wholesale customers even though those systems are not be working properly.<sup>37</sup> As Mr. Olenik points out, “Otherwise, there would be no need for Frontier to conduct such a validation while the systems are in ‘full production mode.’”<sup>38</sup> Accordingly, the quality of wholesale service provided to Verizon customers could be compromised *even before* the proposed transaction

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<sup>31</sup> Applicants’ December 22nd *Ex Parte* Letter at 2.

<sup>32</sup> Olenik Decl. ¶ 15.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> Smith Decl. ¶ 10; *see also* Applicants’ December 17th *Ex Parte* Letter at 7 (“Verizon will put the duplicate systems into use before closing and will operate the customer-facing systems in full production mode for at least 60 days prior to closing during which time Frontier will validate and confirm the results before closing the transaction.”).

<sup>37</sup> *See* Olenik Decl. ¶ 16. Indeed, the Applicants have stated that “*unless and until* Frontier confirms and validates that the systems are working properly, the transaction will not close.” Applicants’ December 22nd *Ex Parte* Letter at 2 (emphasis added).

<sup>38</sup> Olenik Decl. ¶ 16.

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closes.<sup>39</sup> Moreover, the Applicants do not describe the process that they will use to resolve problems that arise during this 60-day period.<sup>40</sup>

*Fourth*, Verizon plans to conduct its own pre-production testing of the replicated systems,<sup>41</sup> but there is no opportunity for an independent third party with expertise in wholesale OSS transitions and integrations or the CLECs that will be using the replicated systems both before and after closing to review the Applicants' OSS transition plans or to conduct their own testing.<sup>42</sup> Furthermore, while "Frontier will have the opportunity to provide feedback on [Verizon's] test plan, to review the results of Verizon's [pre-production] testing, and to request that other tests be run,"<sup>43</sup> it is unclear how useful Frontier's input will be given that Frontier has relatively little experience in serving wholesale customers and Frontier's existing OSS lack many of the functionalities of Verizon's OSS.<sup>44</sup> Indeed, the wholesale customers that have been using Verizon's systems for years are in a much better position than Frontier to identify potential problems with the replicated systems before they are put into full production mode. For the same reasons, it is not clear why Frontier has the experience and expertise to "confirm[] and validate[] that the [replicated] systems are working properly," and in so doing, make the final determination that the transaction can close.<sup>45</sup>

*Fifth*, according to Frontier, "Frontier will retain the Verizon employees who today are involved in operating [Verizon's] systems and who have the experience, skill, and knowledge to use them."<sup>46</sup> But Verizon employees cannot be forced to take employment with Frontier. In fact, there is no way for the Applicants to know which Verizon employees will move to Frontier and how long after the closing of the proposed transaction those employees will stay. Indeed, if, as Verizon states,

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<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See Applicants' December 22nd Ex Parte Letter at 2.*

<sup>42</sup> In Frontier's January 22nd *Ex Parte Letter*, it states for the first time in this proceeding that "CLECs will also have an opportunity to test [the replicated systems] prior to close." Frontier's January 22nd *Ex Parte Letter*, Attachment 1, at 2. However, other than permitting Comcast to conduct testing pursuant to their settlement agreement with Comcast's subsidiaries in four of the affected states, *see* note 117 *infra*, the Joint Commenters are unaware of any other commitments by the Applicants to permit all CLECs in the 13 Affected States to conduct pre-closing testing. In any event, for the reasons discussed above, CLECs should be permitted to conduct testing of the replicated systems *before they are put into full production mode*. *See also* Olenik Decl. ¶ 24.

<sup>43</sup> Applicants' December 22nd *Ex Parte Letter at 2.*

<sup>44</sup> *See Joint Commenters' Petition to Deny at 24-27 & 30-31.*

<sup>45</sup> *See Applicants' December 22nd Ex Parte Letter at 2.*

<sup>46</sup> McCarthy Decl. ¶ 56.

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“Verizon will continue to own former GTE companies [in California, Florida, and Texas], and those operations will continue to use systems substantially similar to the ones Frontier is acquiring,”<sup>47</sup> then it would seem that Verizon would want to retain the employees that have the expertise in operating those systems. Thus, purported assurances that the same employees that run Verizon’s existing systems for the 13 Affected States will run the replicated systems for Frontier post-transaction cannot be credited.

*Sixth*, the Applicants have in place a “systems maintenance agreement” under which “Verizon will maintain the OSS, providing patches, upgrades, and system enhancements, for one to five years after close” and “Frontier can terminate the agreement at any time after the first year without penalty, or choose to take over systems maintenance in whole or in part.”<sup>48</sup> The Applicants explain that “[i]f these functions were not performed by Verizon, Frontier would have to hire a staff or contractor to perform similar functions for these 13 state systems.”<sup>49</sup> But if Frontier were actually acquiring the Verizon employees with the expertise to operate and maintain the replicated systems, no such agreement would be necessary. In addition, addressing the issue of systems maintenance via contract has obvious risks, namely that Frontier will have a financial incentive not to renew the contract after one year even if its provision of wholesale service could benefit from renewal of the agreement.

*Seventh*, according to Frontier, over time, Frontier may merge the replicated systems into its existing systems.<sup>50</sup> As Mr. Olenik states, “[t]his raises the risk that Frontier is merely postponing any OSS integration issues that would otherwise occur at closing until long after closing when regulators are no longer watching.”<sup>51</sup> Indeed, Frontier would have the Commission ignore the implications of a major, complex, and risky integration of critical OSS that may occur at some point in the future even though this integration is a direct consequence of the proposed transaction. If the FCC were to accept this logic, it would create a loophole for merging parties to avoid critical regulatory scrutiny of integration risks by simply delaying the OSS integration for some time.<sup>52</sup>

### **B. OSS Transition In West Virginia**

Verizon states that the cutover from Verizon’s wholesale OSS to Frontier’s existing OSS in West Virginia will be smooth because “the transferring company [is] merely extracting data and

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<sup>47</sup> Smith Decl. ¶ 13.

<sup>48</sup> Applicants’ December 22nd *Ex Parte* Letter at 2.

<sup>49</sup> *Id.*

<sup>50</sup> See McCarthy Decl. ¶ 56.

<sup>51</sup> Olenik Decl. ¶ 17.

<sup>52</sup> Indeed, according to an investment analyst’s report submitted into the record by Frontier, “[t]he systems conversion process has a very long runway for Frontier to complete (possibly five years).” See Frontier’s January 22nd *Ex Parte* Letter, Attachment 3, Frank G. Louthan IV et al., Raymond James & Associates, Inc., U.S. Research, “Frontier Communications Corp.,” at 3 (dated Jan. 19, 2010).

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transferring that data to existing, tested, operational systems of the acquiring company.”<sup>53</sup> While it is true that Frontier will be using its own systems in West Virginia post-transaction, the planned cutover poses a substantial risk that wholesale service will deteriorate post-transaction for several reasons.

*First*, even though the cutover will be to Frontier’s existing systems in West Virginia, there is still a significant risk that Verizon’s data will not be migrated accurately and in its entirety.<sup>54</sup> According to Jack Wade, Vice President of Fiber Engineering and Operations Support Systems for FiberNet, LLC, a One Communications company, the accuracy of the migrated data is critical to all aspects of Frontier’s operations post-transaction.<sup>55</sup> For example, historical data must be migrated from Verizon’s systems to Frontier’s systems completely and accurately in order for wholesale customers such as FiberNet to make informed decisions about how to expeditiously restore service to a particular retail customer.<sup>56</sup> According to Mr. Wade, “[l]oss of historical data is one of the biggest and most common problems resulting from a data migration such as the one planned for the proposed transaction.”<sup>57</sup>

Moreover, while Frontier has stated that, in the event of a problem with the cutover, it plans to rely on a “‘shadow’ OSS load” that it will create one month before cutover,<sup>58</sup> the “shadow” OSS will only be as accurate as the data migrated to it.<sup>59</sup> As Mr. Wade explains, “without sufficient testing, including cyclic redundancy checking, there is a risk that the ‘shadow’ OSS will rely on corrupt data.”<sup>60</sup> Additionally, without ongoing updates to the data that is transferred to the “shadow” OSS one month before closing, the “shadow” OSS data will become quickly outdated as transactions occur, thereby compromising the historical data associated with each customer account.<sup>61</sup>

*Second*, while the Applicants imply that all that is required for the cutover in West Virginia is for Frontier to map Verizon’s data “to its own comparable systems,”<sup>62</sup> the reality is that Frontier’s

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<sup>53</sup> Smith Decl. ¶ 16.

<sup>54</sup> Declaration of Jack Wade on Behalf of FiberNet, LLC, WC Dkt. No. 09-95, ¶ 11 (dated Jan. 26, 2010) (“Wade Decl.”) (attached hereto as “Attachment C”).

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See Applicants’ December 22nd Ex Parte Letter* at 3.

<sup>59</sup> Wade Decl. ¶ 12.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> Smith Decl. ¶ 14.

systems are not at all “comparable” to Verizon’s wholesale OSS in West Virginia.<sup>63</sup> As explained by Mr. Wade, “in order for a data migration to be successful, the platform to which all of the data is moving must also be at least as robust as the platform from which the data is coming,” but “[t]hat is not the case here.”<sup>64</sup> In fact, according to Mr. Wade, “FiberNet has found that Frontier’s OSS in West Virginia are vastly inferior to Verizon’s OSS in West Virginia” because Frontier’s systems are “largely manual” while Verizon’s systems are electronic.<sup>65</sup> For instance, FiberNet is able to place all of its pre-orders and orders for new facilities and its repair requests for existing facilities with Verizon electronically using web-based graphical user interfaces.<sup>66</sup> By contrast, FiberNet is required to place orders with Frontier by filling out the requisite forms in Microsoft Word and Excel and faxing or emailing them to Frontier.<sup>67</sup> According to Mr. Wade, because Frontier’s systems lack most of the functionalities of Verizon’s OSS, it will not be easy to map Verizon’s data to Frontier’s systems.<sup>68</sup> This is troubling given that, in the Applicants’ view, “map[ping] Verizon’s services and data into Frontier’s systems” is “the principal transition task” in West Virginia.<sup>69</sup>

*Third*, although Frontier states that the Synchronoss wholesale gateway for electronic bonding that it has purchased for West Virginia “is an existing system that other carriers, including Embarq and AT&T[,] are already using,”<sup>70</sup> the reality is that the Synchronoss gateway and the industry-standard application programming interfaces (“APIs”) that Frontier plans to deploy<sup>71</sup> are still *new to Frontier*.<sup>72</sup> As Mr. Olenik explains, “the process required for deploying these capabilities and integrating them into a legacy back-office system is complex and raises a lot of unanswered questions.”<sup>73</sup> For instance, Mr. Olenik states, “it is not clear whether these upgrades will provide all of the same functionalities as

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<sup>63</sup> See Wade Decl. ¶ 13.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 5.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* ¶ 13.

<sup>69</sup> Applicants’ December 22nd *Ex Parte* Letter at 3.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> See McCarthy Decl. ¶ 56.

<sup>72</sup> Frontier is making these upgrades in apparent recognition of the fact that its existing OSS in West Virginia are largely manual and lack most of the functionalities of Verizon’s wholesale OSS.

<sup>73</sup> Olenik Decl. ¶ 19.

Verizon's gateway and APIs, how well the gateway and APIs will be integrated into Frontier's existing systems, and whether Frontier employees will know how to work with these upgraded systems."<sup>74</sup>

*Fourth*, it is not clear that Frontier's systems will be able to accommodate the vast amounts of data that will be transferred to Frontier.<sup>75</sup> Frontier claims that a 600,000 line increase to "systems that already support about 2.2 million lines" is a "significant, but manageable increase,"<sup>76</sup> but this means that Frontier will be increasing the number of lines supported by its existing systems by almost one-third.<sup>77</sup> As Mr. Wade observes, "[g]iven that Frontier's systems are largely manual and lack most of the functionalities of Verizon's systems, it is difficult to see how this will be a 'manageable' increase."<sup>78</sup> Furthermore, while Frontier claims that "Frontier's systems are fully scalable," it is not clear that Frontier's OSS in West Virginia will be able to accommodate the substantial increase in *wholesale* orders that it will receive post-transaction.<sup>79</sup> For instance, Frontier has not provided the volume of UNE, special access, customer service record, and number portability requests that it currently processes per month in West Virginia compared to Verizon's wholesale OSS for West Virginia.<sup>80</sup>

### **III. There Is A Material Risk That The Merged Firm Will Perpetuate Verizon's Anticompetitive Conduct, Thereby Slowing Broadband Deployment.**

While the proposed transaction poses the threat that the Merged Firm will fail to provide the same level of wholesale service quality as Verizon and fail to provide wholesale inputs in compliance with its statutory obligations, the Commission must also recognize that Verizon has failed to comply with its legal obligations to wholesale customers in several important respects. Such failures have prevented competitors such as FiberNet from deploying broadband to a substantial portion of the territory served by the incumbent LEC assets at issue here.

*First*, Verizon has slow-rolled FiberNet's effort to obtain access to more than 3,000 remote terminals in West Virginia.<sup>81</sup> FiberNet has not been able to establish a single collocation arrangement in a remote terminal in West Virginia. The consequences of this inability to collocate are significant.

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<sup>74</sup> *Id.*

<sup>75</sup> *See* Wade Decl. ¶ 14.

<sup>76</sup> McCarthy Decl. ¶ 58.

<sup>77</sup> *See* Wade Decl. ¶ 14.

<sup>78</sup> *Id.*

<sup>79</sup> *See* Olenik Decl. ¶ 18.

<sup>80</sup> *Id.*; *see also* Wade Decl. ¶ 14.

<sup>81</sup> *See* Wade Decl. ¶ 20.

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FiberNet has determined that, if it had access to Verizon's remote terminals throughout the state, it could provide broadband service to an additional 15,000 businesses and 150,000 residential access lines.<sup>82</sup>

*Second*, Verizon has discriminated against FiberNet in providing access to Verizon's poles in West Virginia.<sup>83</sup> Among other things, Verizon does not process FiberNet's pole attachment applications within 45 days as required by the FCC's rules<sup>84</sup> and Verizon's make-ready intervals are unreasonably long (i.e., an average of 240 days for 2009).<sup>85</sup> FiberNet has determined that if delays by Verizon and the electric utilities associated with all aspects of the pole attachment process were reduced by 50 percent, FiberNet could double the markets that FiberNet enters each year, resulting in fiber being built to an additional 10 to 15 communities per year.<sup>86</sup>

*Third*, Verizon has increasingly rejected FiberNet's orders for DS1 UNE loops on the basis that "no facilities are available."<sup>87</sup> This has forced FiberNet to purchase these inputs as special access, which substantially increases FiberNet's costs and in turn, reduces the number of customers that FiberNet can serve.<sup>88</sup> For example, between February 2007 and July 2009, Verizon rejected 32 percent of FiberNet's DS1 UNE loop orders and forced FiberNet to purchase these inputs as special access.<sup>89</sup> As a result, FiberNet incurred \$221,825 in additional costs.<sup>90</sup> If FiberNet's loop orders had all been fulfilled as UNEs, FiberNet could have provided service to approximately 66 percent more DS1-served customers.<sup>91</sup>

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<sup>82</sup> See *id.* ¶ 21. The Joint Commenters' Petition to Deny (at 31) incorrectly stated that FiberNet had estimated that if it had access to Verizon's remote terminals in West Virginia, FiberNet could provide broadband service "to an additional 15,000 business and residential access lines" in the state.

<sup>83</sup> See Wade Decl. ¶ 22.

<sup>84</sup> Specifically, Verizon has taken an average of 206 days to process pole attachment applications filed by FiberNet between January 31, 2008 and March 6, 2009. See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* ¶ 23.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

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With this conduct, Verizon has preserved a broadband-free environment in West Virginia. Indeed, the perverse logic of this transaction is that Verizon is now “cashing in” on its success in preventing FiberNet from deploying broadband throughout West Virginia and other areas. This is because Frontier’s willingness to buy the ILEC assets at issue depends largely on the opportunity to deploy broadband to areas to which no intramodal competitor (and in some cases no competitor at all) has deployed broadband.<sup>92</sup> The value proposition of this transaction for Frontier—the opportunity to deploy broadband where little or no competition exists—can only be maintained if Frontier perpetuates Verizon’s anticompetitive conduct. Therefore, it is entirely reasonable, and in fact, critically important, that the Commission address this merger-specific harm with robust remedial conditions.

#### **IV. There Is A Material Risk That The Merged Firm Will Not Comply With Its Obligations Under Section 251(c) Of The Act.**

As explained in the Joint Commenters’ Petition to Deny<sup>93</sup> and Kentucky Data Link’s Comments,<sup>94</sup> it is possible that the Merged Firm will seek to avoid its wholesale obligations under Section 251(c) by claiming the exemption applicable to rural telephone companies under Section 251(f)(1) of the Act.<sup>95</sup> The Merged Firm should be prevented from doing so in the legacy Verizon territory in West Virginia. As a Bell Operating Company (“BOC”) in West Virginia,<sup>96</sup> the Merged Firm will have an ongoing duty to comply with the competitive checklist under Section 271, including

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<sup>92</sup> See, e.g., Frontier’s November 23rd *Ex Parte* Letter at 1 (“Frontier’s strategy and approach to provide service to these types of unserved and underserved areas specifically includes increasing the broadband availability and subscribership in these areas. . . . In many areas in which Frontier will be deploying broadband, it may be the first wireline provider to offer broadband services.”); see also *supra* note 11.

<sup>93</sup> See Joint Commenters’ Petition to Deny at 36.

<sup>94</sup> See Comments of Kentucky Data Link, Inc., WC Dkt. No. 09-95, at 5 (filed Sept. 21, 2009) (“Kentucky Data Link’s Comments”).

<sup>95</sup> Section 251(f)(1)(A) provides that a “rural telephone company” is exempt from obligations applicable to all incumbent LECs under Section 251(c) until (1) “such company has received a bona fide request for interconnection, services, or network elements,” and (2) “the State commission determines . . . that such request is not unduly economically burdensome [and] is technically feasible.” 47 U.S.C. § 251(f)(1)(A).

<sup>96</sup> As the Joint Commenters have explained, under Commission precedent, the Merged Firm should be classified as a BOC in the legacy Verizon territory in West Virginia under Section 3(4) of the Act. See Joint Commenters’ Petition to Deny at 35 (citing *In re Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 514, ¶ 33 (2008)).



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some of the market-opening requirements of Section 251(c),<sup>97</sup> as a condition of its ability to provide in-region long distance service in West Virginia.<sup>98</sup> It would be flatly inconsistent with this duty for the Merged Firm to claim an exemption from those market-opening requirements pursuant to Section 251(f)(1). In the other 13 states affected by the proposed transaction, Verizon has not, to our knowledge, sought an exemption under Section 251(f)(1) and a change in this policy by Frontier would represent a merger-specific harm—one that threatens the widespread deployment of broadband by competitors.

Nor is there a factual basis in the record for concluding that Frontier would be unable to take advantage of the Section 251(f)(1) exemption post-transaction. An examination of the instant Application and the definition of “rural telephone company” under Section 3(37) of the Act does not resolve the matter. A “rural telephone company” is defined in Section 3(37) of the Act as:

[A] local exchange carrier *operating entity* to the extent that such entity— (A) provides common carrier service to any local exchange carrier study area that does not include either—(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.<sup>99</sup>

The Commission has defined “operating entity” as that term is used in Section 3(37) as the “corporate entity bearing legal responsibility for the local exchange services provided.”<sup>100</sup> Thus, it is entirely possible that the Merged Firm could create (or indeed has already created) one or more subsidiaries that provide telephone exchange service to fewer than 50,000 access

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<sup>97</sup> See 47 U.S.C. § 271(c)(2)(B).

<sup>98</sup> See *id.* § 271.

<sup>99</sup> 47 U.S.C. § 153(37) (emphasis added).

<sup>100</sup> In 1999, the Commission sought comment on whether the term “operating entity” in Section 3(37) “refers to an entity operating at the study area level or the holding company level.” *In re Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 96-45 & 97-160, FCC 99-120, ¶ 251 (1999). The Commission subsequently determined that “operating entity” means the “corporate entity bearing legal responsibility for the local exchange services provided,” “regardless of whether that entity serves a single or multiple study areas.” See *In re Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High-Cost Support for Non-Rural LECs*, Tenth Report & Order, 14 FCC Rcd. 20156 ¶¶ 452, 454 (1999).

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lines and therefore, fall within the definition of “rural telephone company” under Section 3(37)(B).

Additionally, it may be possible for the Merged Firm to fall within the definition of “rural telephone company” under Section 3(37)(C).<sup>101</sup> The Commission has explained that a “study area” is “a geographical region generally composed of a telephone company’s exchanges within a single state,” but that “[t]here are instances . . . where a telephone holding company may have several wholly owned telephone subsidiaries within a single state and each one or a combination of subsidiaries may constitute separate study areas.”<sup>102</sup> Thus, Frontier could have a pre-existing subsidiary that provides service to a study area with fewer than 100,000 access lines and that subsidiary would therefore qualify as a rural telephone company under Section 3(37)(C).<sup>103</sup> Frontier already serves fewer than 100,000 access lines in seven of the states at issue.<sup>104</sup> For example, as of December 31, 2008, Frontier provided service to only 552 access lines in Ohio; to 4,647 access lines in Indiana; and to 12,626 access lines in Oregon.<sup>105</sup> As of the same date, Verizon provided service to fewer than 100,000 access lines in three of the states at issue (i.e., 6,297 access lines in Arizona; 24,205 access lines in California; and 35,989 access lines in Nevada).<sup>106</sup>

**V. The Commission Must Impose Conditions In Order To Mitigate The Risks Posed By The Proposed Transaction And Find That The Transaction Is In The Public Interest.**

The Commission must impose conditions on any approval of the proposed transaction in order to mitigate the risks described herein and in the Joint Commenters’ Petition to Deny.<sup>107</sup>

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<sup>101</sup> See 47 U.S.C. § 153(37)(C).

<sup>102</sup> See *In re Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd. 5974 ¶ 4 (1990).

<sup>103</sup> Study area boundaries are frozen as they were on November 15, 1984. See 47 C.F.R. § 36, Appendix-Glossary. Exchanges that Frontier acquires from Verizon will remain separate from Frontier’s existing study areas unless Frontier petitions for and obtains a waiver of its study area definitions from the Commission. See *In re Federal-State Joint Board on Universal Service*, Order, 19 FCC Rcd. 11538 ¶ 12 n.31 (2004) (“A carrier must apply to the Commission for a waiver of the study area boundary freeze, if it wishes to sell or purchase additional exchanges and the transaction requires the alteration of an existing study area boundary.”).

<sup>104</sup> See Frontier November 2009 Investor Presentation at 21.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> Among other things, in their Petition to Deny, the Joint Commenters explained that there is a material risk that the Merged Firm will increase wholesale rates post-transaction. See Joint

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Most of those risks are direct results of the proposed transaction. Where this is the case, the FCC should adopt conditions designed to prevent the merger-specific harms in question. But the Commission must also recognize that it is impossible to determine the magnitude of the harm that this transaction will ultimately cause to competition and consumer welfare. The previous Verizon spin-off transactions in Hawaii and in Vermont, New Hampshire and Maine imposed extraordinary costs on retail customers, wholesale customers and consumer welfare more generally. The Commission cannot dismiss the possibility of a similar outcome for this transaction. Moreover, even a “successful” spin-off of the ILEC assets at issue to Frontier will likely result in Frontier continuing Verizon’s anticompetitive practices (e.g., denial of access to remote terminals, slow-rolling access to pole attachments and implausibly high rates of “no facilities” UNE order rejections) as part of its efforts to squeeze as much profit out of the assets as possible. It cannot be consistent with the public interest to enable Verizon to engage in such conduct, to cash-in on it in the proposed transaction, and then to enable the purchaser to prosper by perpetuating the obviously anticompetitive conduct. Even if the perpetuation of such conduct is not viewed as merger-specific, imposing merger conditions to address this conduct and in turn, establish the preconditions for competition post-transaction, is the only way to ensure that the overall benefits of the proposed transaction outweigh the overall risks. In other words, to achieve net public interest benefits, the FCC may need to adopt conditions that extend beyond a narrow definition of merger-specific harm.

Nor is there any question that the FCC has the authority to adopt such conditions. The Commission has the authority under Section 214(c) of the Act to attach “such terms and conditions as in its judgment the public convenience and necessity may require.”<sup>108</sup> As the

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Commenters’ Petition to Deny at 33-34. The Joint Commenters also explained that there is a material risk that the Merged Firm will not be able to provide the same functionalities and the same level of customer service support that Verizon currently provides. *See id.* at 24-33. For example, in provisioning special access services, Verizon, unlike Frontier, offers nationwide service level agreements for DS1 and DS3 special access facilities, provides monthly wholesale performance reports, conducts annual customer summits for large wholesale customers, and uses e-bonding to support a range of ordering, provisioning, maintenance and repair functionalities. *See id.* at 24-26. Verizon also provides wholesale customers such as tw telecom with least-cost billing for DS1 special access circuits ordered under Verizon’s Term Volume Plan (i.e., Verizon’s systems automatically provision and bill the transport component of each circuit as a “MetroLAN” rate element when MetroLAN is the least expensive rate element available to the customer). *See id.* at 26 & n.86. Perhaps most importantly for the future of broadband to businesses, Verizon has expertise in the provision of Ethernet service to wholesale customers whereas it is not at all clear that Frontier has such expertise or, if it does, whether it is willing to use it. *See id.* at 27. Additionally, in provisioning UNEs and other wholesale inputs to customers such as FiberNet, Verizon provides dedicated account managers, detailed point-of-contact lists, monthly wholesale performance reports, industry letters, CLEC User Forum materials, and other information, but it is not clear that FiberNet will be able to do the same post-transaction. *See id.* at 30-31.

<sup>108</sup> 47 U.S.C. § 214(c).

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FCC has recognized, it has the authority “to rely upon [its] extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.”<sup>109</sup>

In fact, in merger review proceedings, the Commission has often imposed conditions (or adopted applicants’ voluntary commitments as conditions) that advance the public interest even though the conditions do not narrowly redress transaction-specific harms. For example, in the *SBC-AT&T Merger Order*, the Commission adopted as a condition of its approval the applicants’ voluntary commitment to offer stand-alone DSL despite the Commission’s finding that the transaction was “not likely to result in anticompetitive effects for mass market services.”<sup>110</sup> The Commission concluded that “this commitment will serve the public interest.”<sup>111</sup> The Commission also adopted as conditions of its approval the applicants’ commitments with respect to Internet backbone services (i.e., maintaining settlement-free peering arrangements, publicly posting peering policies, and complying with the principles of the FCC’s *Internet Policy Statement*) even though the Commission expressly found “no likely anticompetitive effects for Internet backbone and related services as a result of the merger.”<sup>112</sup> Again, the Commission found that the Internet backbone “commitments will serve the public interest.”<sup>113</sup> The Commission made similar findings of no merger-specific harm and yet imposed similar conditions in the *Verizon-MCI Merger Order*.<sup>114</sup> More recently, in the *CenturyTel-Embarq Merger Order*, the Commission adopted as conditions of its approval a number of the applicants’ voluntary commitments even though they did not address harms arising directly out of the transaction between CenturyTel and Embarq because those conditions “will serve the public interest.”<sup>115</sup>

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<sup>109</sup> *In re Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio, Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd. 12348, ¶ 33 (2008).

<sup>110</sup> *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶ 101 (2005) (“*SBC-AT&T Merger Order*”); see also *id.* ¶ 104.

<sup>111</sup> *Id.* n.322.

<sup>112</sup> *Id.* ¶ 108.

<sup>113</sup> *Id.*

<sup>114</sup> See *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 102, 105 & n.320 (2005) (“*Verizon-MCI Merger Order*”); see also *id.* ¶ 109.

<sup>115</sup> For instance, the Commission adopted the following conditions, among others: (1) “Orders will be processed [by the merged company] in compliance with federal and state law, as well as the terms of applicable interconnection agreements”; (2) “CenturyTel companies will not limit the number of ports

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Furthermore, contrary to the Applicants' suggestions,<sup>116</sup> the existence of settlement agreements between the Applicants and interested parties at the state level<sup>117</sup> does not obviate

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that can be processed"; (3) "No later than 30 months after the Transaction Closing Date, the CenturyTel companies will provision DS1 loops within 6 business days, 80 percent of the time"; (4) "When a number is ported from CenturyTel, E-911 records will be unlocked at the time of porting"; and (5) "the merged company will make available retail broadband Internet access . . . to 90 percent of its broadband eligible access lines using wireline technologies within three years of the Transaction Closing Date." *See CenturyTel-Embarq Merger Order*, Appendix C.

<sup>116</sup> *See, e.g., Applicants' January 20th Ex Parte Letter* at 2-3.

<sup>117</sup> The Applicants have reached settlement agreements with several CLECs, including tw telecom, in Oregon and Washington, and a settlement agreement with Comcast's subsidiaries in Illinois, Ohio, Oregon, and Washington. *See Stipulation, Oregon PUC No. UM 1431* (filed Dec. 3, 2009), Attachment 1, Settlement Conditions ("OR CLEC Settlement"), <http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har134014.pdf>; Multiparty Settlement, Washington UTC Docket No. UT-090842 (filed Dec. 23, 2009), Attachment 1, Settlement Conditions ("WA CLEC Settlement"), <http://wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/c9619f71064ae14e882576950074e59d!OpenDocument>; Settlement Agreement with Comcast Phone, LLC on behalf of its subsidiaries, Comcast Phone of Illinois, LLC d/b/a Comcast Digital Phone, Comcast Phone of Ohio, LLC, Comcast Phone of Oregon, LLC, and Comcast Phone of Washington, LLC, Oregon PUC No. UM 1431 (filed Dec. 8, 2009) ("Comcast 4-State Settlement"), <http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har155856.pdf>. Because the text of the Settlement Conditions attached to the OR CLEC Settlement and the WA CLEC Settlement are identical, those conditions are referred to in Attachment A to this letter as "OR/WA CLEC Settlement." Frontier has also reached settlement agreements with CLECs, including FiberNet, in West Virginia as well as with Comcast's subsidiary in West Virginia. *See Joint Stipulation and Agreement for Settlement with CLECs and U.S. Cellular, West Virginia PSC Case No. 09-0871-T-PC* (filed Jan. 11, 2010) ("West Virginia CLEC Settlement"), <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=287242&NotType='WebDocket'>; Settlement Agreement with Comcast Phone of West Virginia, LLC, West Virginia PSC Case No. 09-0871-T-PC (filed Jan. 11, 2010) ("Comcast West Virginia Settlement"), <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=287242&NotType='WebDocket'>. Additionally, the Applicants have reached settlement agreements with state regulatory commission staff in Oregon, Washington, and Ohio. *See Stipulation, Oregon PUC No. UM 1431* (filed Dec. 4, 2009), <http://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAR&FileName=um1431har102913.pdf>; Settlement Agreement, Washington UTC Docket No. UT-090842 (filed Dec. 24, 2009), <http://wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/04524cb7901b823b882576b0006b19ac!OpenDocument>; Stipulation and Recommendation—Joint Applicants, Staff and the Office of the Ohio Consumers' Council, PUC of Ohio Case No. 09-454-TP-ACO (filed Dec. 8, 2009), <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09L08B61659F10681>.

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the need for the FCC to impose conditions at the national level. To begin with, the conditions reached in the various settlement agreements do not apply in all of the states affected by the proposed transaction. Indeed, as the Applicants have pointed out, four of the affected states (Idaho, Indiana, Michigan, and Wisconsin) do not even require state commission approval of the transfer.<sup>118</sup>

Moreover, the conditions reached in the various settlement agreements are the product of negotiations that took place in the context of state commission merger review proceedings. As a result, some of the conditions contained in the settlement agreements are insufficient and incomplete in certain respects. For example, while the West Virginia CLEC Settlement permits CLECs to conduct pre-cutover testing,<sup>119</sup> it does not require the Applicants to retain an independent third party consultant to review the Applicants' cutover plans and to conduct its own assessment of the readiness of Frontier's systems for cutover. Independent third-party oversight of the entire cutover process could minimize the risk that CLECs discover major problems with Frontier's systems once CLECs are finally able to conduct testing. In addition, the Applicants point out that "Frontier has also committed [under the West Virginia CLEC Settlement] not to cut over to its systems until it has validated that the wholesale OSS and Synchronoss Front End system are functioning and operational."<sup>120</sup> Given that, as discussed in Section II.B. above, Frontier's OSS in West Virginia are vastly inferior to Verizon's OSS, Frontier has not provided information on the amount of wholesale business it conducts in West Virginia today, and Frontier has not previously operated a Synchronoss Front End system in West Virginia, it is unclear why Frontier is qualified to decide whether its systems are "functionally comparable to what Verizon is providing prior to closing."<sup>121</sup>

In addition, although "as part of the Applicants' settlements in certain states, Verizon has agreed to undertake pre-production and pre-closing testing of the replicated systems" for the 13 Affected States and to allow a third-party reviewer to validate those results, there is still no opportunity for CLECs and an independent third-party consultant to conduct their own testing of the replicated systems and thereby minimize the data migration and other risks discussed in Section II.A above. Thus, the replicated OSS conditions reached in the various state-level agreements are insufficient. Contrary to the Applicants' assertion,<sup>122</sup> it is therefore irrelevant that those conditions will apply to the common OSS used for all 13 Affected States.

In light of the foregoing, the Commission should establish comprehensive conditions that apply to the Merged Firm as a whole, in all affected states, and that complement the

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<sup>118</sup> See Applicants' December 22nd *Ex Parte* Letter n.1.

<sup>119</sup> See Applicants' January 20th *Ex Parte* Letter at 2.

<sup>120</sup> *Id.*

<sup>121</sup> West Virginia CLEC Settlement ¶ 10.

<sup>122</sup> See Applicants' January 20th *Ex Parte* Letter at 3.

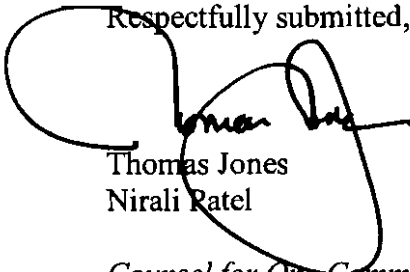
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conditions established at the state level. The Joint Commenters have proposed such conditions in Attachment A. Where relevant in Attachment A, the Joint Commenters have briefly noted in italics their rationale for requesting the proposed condition despite the existence of a condition covering the same subject matter in one or more of the various state-level settlement agreements.

### VI. Conclusion.

For all of the reasons discussed herein, the Commission should impose the conditions proposed in Attachment A on any approval of the proposed transaction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over a large, loopy circular mark.

Thomas Jones  
Nirali Patel

*Counsel for One Communications Corp.,  
tw telecom inc., Cbeyond, Inc., and  
Kentucky Data Link, Inc.*

Attachments

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## **ATTACHMENT A**



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**PROPOSED CONDITIONS**

For purposes of the conditions proposed herein, the following definitions apply:

“Transaction” means the proposed acquisition of the incumbent LEC assets of Verizon Communications Inc. by Frontier Communications Corporation that is the subject of the applications for FCC approval in WC Docket No. 09-95.

“Closing Date” means the date on which the Transaction is consummated.

“Verizon” means Verizon Communications Inc. and its subsidiaries.

“Frontier” means Frontier Communications Corporation and its subsidiaries after the consummation of the Transaction.

“Legacy Frontier” means Frontier Communications Corporation and its subsidiaries prior to the consummation of the Transaction.

“14 Affected States” means Arizona, California, Idaho, Illinois, Indiana, Michigan, Nevada, North Carolina, Ohio, Oregon, South Carolina, Washington, West Virginia, and Wisconsin.

All of the conditions proposed herein apply for 36 months from the Closing Date of the Transaction, except as otherwise indicated. All of the conditions proposed herein apply throughout the entirety of Frontier’s service territory in the 14 Affected States, excepted as otherwise indicated. Any failure to comply with the conditions proposed herein shall be subject to an enforcement action by the FCC or a private party. The procedures governing such enforcement action shall be the same as those that would apply if the conditions set forth below were requirements of Title II of the Communications Act.

1. Frontier will not discontinue, withdraw or stop providing, or seek to discontinue, withdraw or stop providing, any Verizon wholesale service offered to CLECs as of the Closing Date for one year after the Closing Date except as approved by the FCC.

*[Relevance Of State-Level Conditions: This proposed condition is similar to OR/WA CLEC Settlement Condition 1, Comcast 4-State Settlement Condition a, and Comcast West Virginia Settlement Condition a, and should be applied to all 14 Affected States.]*

2. Frontier will not seek to recover, directly or indirectly, through wholesale service rates or other fees paid by CLECs any Transaction-related costs including but not limited to one-time transfer, branding or transaction costs, management costs, or OSS transition costs.

*[Relevance Of State-Level Conditions: This proposed condition is similar to OR/WA CLEC Settlement Conditions 2 & 3, Comcast 4-State Settlement Conditions b & c, Comcast West Virginia Settlement Conditions b & c, and West Virginia CLEC Settlement Condition 16, and should be applied to all 14 Affected States.]*